PETITIONERS' BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Court of Claims is reported in Case No. 45,214, June 2, 1941 (92 Ct. Cls. —; R. 7-14).

(A) The Statutory Provision Sustaining Jurisdiction to Review the Judgment.

The statutory provision sustaining jurisdiction to review the judgment is section 3 (b), Act of Feb. 13, 1925, 43 Stat. 939.

(B) The Date of the Judgment Sought to be Reviewed.

The judgment sought to be reviewed was entered in the office of the Clerk of the Court of Claims on June 2, 1941 (R. 14).

(C) The Statutes Involved.

The statutes involved are Section 21 of Ch. 391, Act of June 22, 1874 (18 Stat. 190); Ch. 407, Act of June 10, 1890 (26 Stat. 131); and Ch. 149, Act of March 3, 1875, as amended by Sec. 13, Ch. 212, Act of March 3, 1933, Title 31, Sec. 227, U. S. Code (47 Stat. 1516).

(D) Statement of the Case.

The petitioners seek the review of a judgment of the Court of Claims entered June 2, 1941, sustaining a demurrer to the petition in the court below, upon the ground that it did not allege a cause of action against the United States within the jurisdiction of that court, in that more than six years had elapsed since the accrual of the cause of action when it was brought in that court. A detailed statement of the facts upon which the cause of action is founded, is set forth in the petition for a writ of certiorari in this Court.

ARGUMENT.

(Italics ours.)

I.

Moneys Illegally Collected by the United States as Duties Upon Free Imports, or Erroneously Paid, Are Held by the Defendant in the Nature of a Trust, or Bailment, Repayable Out of Such Excess Deposits in the Hands of the Collector, or Out of Moneys Specifically Appropriated by Congress.

A.

Under the then Tariff Act, as is also the case under the present act, moneys received by Collectors are deposits of duties against the importation, subject to appraisal and liquidation.

Section 24, Ch. 407, Act of June 10, 1890; 26 Stat. 140, which was then in force, provided for the refund of moneys paid or *deposited* with a Collector for unascertained duties.

Customs Regulations of 1908 provided as follows:

> "Art. 1082—*Refund of Excess of Deposits.* Whenever it is found that more money has been deposited with the Collector, as unascertained or estimated duties, than is found to be due upon the liquidation of the entry, *the excess shall be refunded from the Collector's 'Excess of Deposits Account.'* Where no remittances are received for the above account, or where it has been exhausted, Collectors shall forward an estimate for the necessary funds to pay the same."

And this is now the procedure (Act of June 17, 1930, Title IV, Section 505; 46 Stat. 732).

In *Brune* v. *Marriott*, Fed. Case 2052; Taney, 132; affd. 50 U. S. (9 How.) 619, the Court had under consideration

the effect of a similar section then in force, and Taney, C. J., sitting in the Circuit Court of Maryland, said:

> "The payment of the money upon the estimated duties is rather in the nature of a *pledge or deposit than a payment;* for it remains in the hands of the proper officer, subject to the final assessment of the duties and if more has been paid than is due (which is most commonly the case), the surplus belongs to the importer, and is returned to him."

This ruling was approved in *Barney* v. *Rickard,* 157 U. S. 352, 362 and 363.

Prior to the Customs Administrative Act of 1890 (Ch. 407, Laws of 1890; 26 Stat. 131), it had been the custom of bringing suits against Collectors to recover duties. As a result large sums of money remained in the hands of Collectors, who were threatened by suits, and to prevent such actions (*Elliott* v. *Swartwout,* 10 Pet. 1937) a section was inserted in the Civil & Diplomatic Appropriations Bill of March 3, 1839, Ch. 82, Sec. 2; 5 Stat. 339, 348 which read, in part, as follows:

> "• • • but when it shall be shown to the satisfaction of the Secretary of the Treasury *that in any case of unascertained duties or duties paid under protest more money has been paid to the collector or person acting as such, than the law required should have been paid, it shall be his duty to draw his warrant upon the Treasurer in favor of the person or persons entitled to the overpayment, directing the said Treasurer to refund the same out of any money in the Treasury not otherwise appropriated."*

Thereafter, Sec. 24 of Ch. 407, Laws of 1890 (26 Stat. 140) was enacted in substantially the same form, and the section, as amended, reads as follows:

> "Sec. 24. That whenever it shall be shown to the satisfaction of the Treasury that in any case of un-

> ascertained, or estimated duties, or payments made upon appeal, more money has been paid to or deposited with a collector of customs than, as has been ascertained by final liquidation thereof, the law required to be paid or deposited, the Secretary of the Treasury shall direct the Treasurer to refund and pay the same out of the money in the Treasury not otherwise appropriated. *The necessary moneys therefor are hereby appropriated, and this appropriation shall be deemed a permanent indefinite appropriation;* * * * Provided that the Secretary of the Treasury shall in his annual report to Congress, give a detailed statement of the various sums of money refunded under the provisions of this act, or of any other act of Congress, relating to the revenue, together with the copies of the rulings under which repayments were made."

And Sec. 25 of the same act provided:

> "Sec. 25. That from and after the taking effect of this act no collector or other officer of the customs shall be in any way liable to any owner, importer, consignee or agent of any merchandise, or any other person, for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges or duties on or on account of said merchandise * * *".

Thus not only was provision made to prevent the bringing of suits against the Collector or other officer of the customs for duties, but the Secretary of the Treasury was required to direct the Treasurer to make refunds out of the money in the Treasury not otherwise appropriated, and *permanent indefinite appropriations were provided by Congress* to pay such refunds.

No provision was made in the statute as to the time to pay the refunds, nor was any time set for demand by the importer. The only inference that can be drawn from these provisions and from the provision that Congress was to provide "a permanent and *indefinite* appropriation" to

pay such refunds, is that the importer could make application therefor, and the Treasurer could pay the same, at *any time*. The word "indefinite" has been defined in the Standard Dictionary to mean, "without limitation", and in the statute meant without limitation as to amount.

It has been the immemorial custom to pay refunds promptly, but very often they have been paid ten, fifteen, and even twenty years after liquidation. Accordingly, the Collector, being the disbursing agent of the Secretary of the Treasury (*Joannidis* v. *Loeb*, 191 Fed. 93), well knowing that refunds were payable at any time, drew the checks in question (R. 4).

The demurrer admits that payment was refused by the Comptroller General not because the statute of limitations barred it, but because he had directed the sum to be applied against an alleged claim against the intestate for loss of revenue; that the Government's claims were without legal right or justification, and that no credit, offset or counterclaim existed in favor of the defendant against the intestate or petitioners (R. 5-6). Such application by the Comptroller General could only have been made upon the assumption that the money represented by the checks in outstanding liabilities belonged to the intestate.

It was held by Lacombe, J., in *Joannidis* v. *Loeb*, 191 Fed. 93, that the refund of moneys under the Customs Administrative Act of June 10, 1890, pursuant to a decision of the Board of General Appraisers, and the drawing of the checks by the Collector, were administrative functions under the Act.

It was the duty of the Collector under the statute and regulations then in force, to make the refunds, and there was nothing therein requiring payment at any particular time after liquidation. Nor was there any limitation of time when the importer was required to make demand. Congress appropriated the money to pay the refunds by a

permanent and indefinite appropriation, and the intestate could have demanded the money, and was entitled to have it, at any time.

In this case the imported material was free, and the taxing of a duty thereon was illegal. Money deposited with a collector as estimated duty on free goods, as the Board of General Appraisers here determined, could only have been received in trust for the importer. The Government had no legal right to exact it, and in good morals should at all times be ready to repay it. When the collector, as disbursing agent of the Secretary of the Treasury, drew the checks and transmitted them to the Comptroller General to be held in the account of outstanding liabilities, it placed the defendant in the precise situation as a bank holding deposits, and courts of high authority have held from time immemorial that the statute of limitation does not operate until demand for payment is made and refused by the Bank (cf. *U. S.* v. *Wardwell*, 172 U. S. 48; *Downes* v. *Phoenix Bank of Charlestown*, 6 Hill (N. Y.) 297).

> "The right of an importer to a refund of duties collected by the Government upon a measure of goods not imported, not only rests its foundation upon the decent rights of man, but has ever been carefully and scrupulously upheld by the courts" (*Lippincott* v. *United States*, 11 U. S. Cust. Appls. 29).

The Board of General Appraisers made its determination that the goods were duty free. The Collector liquidated the entries, and petitioners became entitled to the refunds under Sec. 2 of the Act of May 27, 1908 (35 Stat. 405), which amended Sec. 15 of Chap. 407 of the Act of June 10, 1890, by adding thereto as follows:

> "All final *judgments*, when in favor of the importer, shall be satisfied and paid by the Secretary of the Treasury from the permanent indefinite appropriation provided for in Sec. 24 of this act."

The determination of the Board of General Appraisers was a final judgment of a court of competent jurisdiction (*United States* v. *Macy*, 13 Ct. Cust. Appls. 245, 248).

The money due to the intestate under the judgment of the Board of General Appraisers and liquidation of the entries was not subject to any statute of limitation, and in drawing the checks the Collector was satisfying a judgment of a judicial tribunal.

B.

There are, however, certain other cogent facts in this case which definitely establish a relationship in the nature of a trust or bailment. The checks were covered into the Treasury by deposit into the account of outstanding liabilities, which implied a promise that the money was on hand in the Treasury, available to those entitled thereto.

A case in point is *United States* v. *Wardwell*, 172 U. S. 48. In June, 1869, three checks were issued in favor of Wardwell on the Assistant Treasurer of the United States. They were lost or destroyed and the amounts thereof were, as here, covered into the Treasury and carried into the account of "outstanding liabilities." Wardwell died. In 1890 his administratrix applied for payment but was refused. In 1896, 27 years after the checks were issued, but within six years after such refusal, she brought suit in the Court of Claims. The Government pleaded in bar the six-year statute of limitations. A recovery was allowed. On appeal by the Government to this Court it was held that the limitation did not begin to run until demand for payment of the checks had been made and refused. In construing sections 306, 307 and 308 of the Revised Statutes, Mr. Justice Brewer, writing for the court, said (pp. 52-54):

> "It is further contended that sections 306, 307 and 308 relate to what is simply a matter of bookkeeping, and do not in any manner change the scope of the lia-

bility of the Government. But we are of the opinion that they mean something more. *While it may be that they do not provide for the creation of an express trust, liability for which, according to general rules, continues until there is a direct repudiation thereof, yet they contain a promise by the Government to hold the money thus covered into the Treasury for the benefit of the owner until such time as he shall call for it. This is a continuing promise, and one to which full force and efficacy should be given.* If bookkeeping was the only matter sought to be provided for, there were no need of section 309. That prescribes payment, and payment in a particular way. The payee does not simply surrender his cheque and receive money; but 'on presenting the same to the proper officer' he is 'entitled to have it paid by the settlement of an account and the issuing of a warrant in his favor.' * * * It will also be noticed that the purpose of the Act of 1866 was, as expressed in its title, not merely to 'facilitate the settlement of the accounts of the Treasury of the United States,' not merely to perfect a system of bookkeeping, but also 'to secure certain moneys—to persons to whom they are due, and who are entitled to receive the same.' * * * In other words, the purpose of the Government by this statute is to secure to each party who holds government paper the amount thereof, to place it in the treasury to his credit, and to prescribe a method by which whenever he wishes he can obtain it. No time is mentioned within which he must apply for a warrant or after which the money is forfeited to the Government. The ordinary rules for the maturity of negotiable paper do not control. *Congress has directed that the money already once appropriated and chequed against shall be placed in the treasury and held subject to the call of the party for whose benefit it has been so appropriated and chequed. There is no occasion for suit until after his application for a warrant is refused. When the contract created by the promise made in section* 308 *is broken, then a claim for the breach of such contract first accrues, and the limitation prescribed by section*

1069 *begins to run.* There is thus no conflict with that section. Its full force is not impaired.

"In this connection it may not be amiss to notice those authorities in which it is held that upon the ordinary deposit of money with a bank no action will lie until a demand has been made, by cheque or otherwise, and that hence the statute of limitations will not begin to run until after a refusal to pay on such demand."

Citing *Downes* v. *Phoenix Bank of Charlestown,* 6 Hill. 297, the Court quoted from the opinion of Bronson, J., who said:

"Here, the contract to be implied from the usual course of the business is, that the banker shall keep the money until it is called for. Although it is not strictly a bailment, it partakes in some degree of that character."

The Attorney General will undoubtedly endeavor to distinguish that case by claiming that the checks were delivered six years from the dates when the original claims accrued. There is no merit to this contention, for the decision went expressly upon the ground that the money had been appropriated by Congress and checked against, and not because of delivery of the checks. However, in the case at bar the placing of the checks in outstanding liabilities operated as a delivery.

United States v. *Taylor,* 104 U. S. 216, is also in point. By Ch. 45 of the Act of August 5, 1861, it was provided that the surplus proceeds of sales of real estate sold for direct taxes due to the United States shall, after satisfying the tax, costs and charges, be deposited in the Treasury to be held for the use of the owner, nine years after the sale. Taylor sued in the Court of Claims to recover the amount on deposit. The Government pleaded the statute of limitations. He recovered. On appeal to this Court, the Court said at p. 221:

"*This section limits no time within which application must be made for the proceeds of the sale. The*

> *Secretary of the Treasury was not authorized to fix such a limit. It was his duty, whenever the owner of the land or his representative should apply for the money, to draw a warrant therefor without regard to the period which had elapsed since the sale. The fact that six or any number of years had elapsed did not authorize him to refuse payment.* The person entitled to the money could allow it to remain in the treasury for indefinite period without losing his right to demand and receive it. It follows that if he was not required to demand it within six years he was not required to sue for it within that time."

The *Taylor* case was held to "be in point by this Court in the *Wardwell* case.

Ray v. *United States*, 50 Fed. 166, is also in point. There the action was to recover income taxes deducted from the salary of a District Judge. On May 10, 1872, a statement was made by the First Comptroller of the Treasury showing that $504.71 had been withheld from his salary. This was referred to the Commissioner of Internal Revenue who entered the same under a schedule of claims for the refunding of taxes erroneously assessed. Thereupon an account was stated by an auditor of the Treasury, which was certified for payment on August 2, 1875, and a draft issued for the amount to the order of the District Judge. *The draft was held in the office of the Commissioner of Internal Revenue* or the First Comptroller until May 31, 1887, a period of 18 years after the last deduction. It was then covered in outstanding liabilities. On May 18, 1891, demand was made for payment which was refused. Action was brought November 12, 1891. It was claimed that the six-year statute barred the action. At page 168 the Court said:

> "It is insisted that the claim in suit first arose at the time between 1864 and 1869 when the tax was wrongfully deducted and withheld from the salary of Judge

McDonald. * * * The Government thereafter held this fund in the nature of a trust, awaiting demand of the payee or his legal representative. *Rev. St.* 1878, *Sec.* 307, *makes a permanent appropriation for the payment of all such outstanding and unpaid drafts.* Section 308 provides for their payment on presentation thereof, *without limit of time.* Under such circumstances, the fund became impressed with a trust. United States *v.* Taylor, 104 U. S. 216; Waddell's Case, 25 Ct. of Cls. 323; Wayne *v.* United States, 26 Ct. Cls. 274."

In *Wayne* v. *United States*, 26 Ct. Cls. 274, the suit was to recover the amount of a draft in outstanding liabilities. It was issued December 8, 1873, but was never received since *it was stolen in the mails.* The six-year statute of limitations was interposed as a defense. Richardson, C. J., said (pp. 288-289):

"In our opinion this defense cannot prevail. *Money carried to the appropriation account of 'outstanding liabilities' is held in the nature of a trust fund awaiting demand of the parties to whose credit it stands.* Revised Statutes, Sec. 307, makes a permanent appropriation for the redemption and payment of all such outstanding and unpaid drafts, and Section 308 provides for their payment when presented, without limit of time.

* * * * * * *

"We now hold that the statute of limitation does not run against outstanding liabilities so entered in the books of the Treasury Department for which there is a permanent appropriation and other provisions by Revised Statutes, Secs. 306, 307, 308, until the outstanding drafts, etc., are presented, *or demand is made* without the draft and its nonproduction is properly accounted for. The case cannot be distinguished in principle from that of Taylor (104 U. S. R. 216) affirming the judgment of this Court (14 C. Cls. R. 339).

* * * * * * *

> "The statute of limitations does not run against a fund held in trust until the trustee disavows the trust. When, on demand by the claimant's predecessor, in 1888, the Comptroller of that year not only refused payment, but, overruling the previous action of his predecessors of more than ten years standing, *ordered the money to be withdrawn from the account of outstanding liabilities and carried to another account, and that was done, this was a disavowal of the trust, and the statute might begin to run from that date, but not before.* This suit was commenced within the six years from that time."

In *Russell* v. *United States*, 37 C. Cls. 113, suit was brought on an account in outstanding liabilities. By an Act of Congress of March 3, 1877 (19 Stat. 518) an appropriation was made for payment of claims allowed by the Commissioner of Claims. A check for $725.00, allowed to one, Edwards, was mailed *but not delivered*, and was returned to the Treasury, whereupon it was covered into the Treasury. It was held that the plaintiff would have been entitled to recover, but for the fact that the act with respect to Edwards' claim had been repealed.

Sections 149, 150 and 151 of Title 31 of the United States Code, under which the intestate's checks (R. 4) were covered into the Treasury, are the same as sections 306, 307 and 308 of the Revised Statutes referred to in the *Wardwell* case.

Thus, the money in outstanding liabilities was in legal effect a permanent appropriation for the redemption and payment of the checks of petitioners, who were entitled to a warrant for payment.

With respect to appropriations made by Congress for the payment of indebtedness owing by the Government, the word "appropriation" must be given its customary meaning (4 C. J. 1458).

That the checks here were never delivered is immaterial. The money was covered into the Treasury as an outstanding liability owing to petitioners. That the Comptroller General directed application thereof to partial liquidation of a claim for alleged loss of revenue alleged to be due the United States from the intestate is also immaterial to this question (R. 9-10). He had no legal right to make such direction as the court below found, "neither the deceased Eustadio D. Papavasilopulo, nor the plaintiffs, was ever indebted to the United States in any amount for any purpose, and the United States was not entitled to use or apply these refunds on export duties as an offset in partial liquidation of any claim against Papavasilopulo or the plaintiffs" (R. 10).

C.

Concededly there can be no right in the Government to retain money paid by an importer upon free goods, and the least that the importer can expect is that the money will be held as a bailment. In such a case the bailor has the right to redelivery on demand (37 C. J. 840).

Thus the right of action for the money due accrued on demand and refusal.

> "Where a deposit of money is made the general rule is that a cause of action accrues in favor of the depositor against the depositary only upon demand and refusal, or the assertion of some adverse claim in the depositary" (37 C. J. 481, Sec. 196).

See *Smiley* v. *Fry*, 100 N. Y. 262; and
Boughton v. *Flint*, 74 N. Y. 476.

The action of the Comptroller General in directing application of the amount on deposit in the Account of Outstanding Liabilities, was the assertion of an adverse claim, which entitled the petitioners to sue.

In the opinion of the court below sustaining the demurrer, Judge Littleton stated that the rule of law relating to deposits had no application to this case for the reason that the "amounts paid to the Collector of Customs upon the entry of the merchandise pursuant to the assessment made by the collector, were not deposits in the true sense of the word although, for the purpose of fixing the amount of tariff duty actually due on the imported merchandise, the amounts paid to obtain release of the merchandise were in the nature of deposits on account of the duties imposed by the statute. More might be due * * *. In making the original assessments the collector was administering an act of Congress, and in making payments thereof the importer was discharging an obligation under the act * * *" (R. 13). In this the court erred and overlooked the fact that the merchandise here involved was free.

The court also stated that "the right to sue having once occured and the period of limitation within which suit might be brought upon the award (of the Board of General Appraisers) having expired, we think a new cause of action with a new period of limitation was not created by the drawing of the checks by the Collector of Customs and the withholding of the amount of such checks by the Comptroller General" (R. 12-13). We respectfully submit that in this the court was again in error. We have shown that when the collector drew the checks he was performing a duty under Sec. 24 of Ch. 407 of the Act of 1890 (26 Stat. 131). He could perform that act at any time since the statute fixed no time for payment of refunds, and undoubtedly he drew the checks well knowing that it was his duty to do so; and in depositing the checks in outstanding liabilities the Comptroller General was also performing an administrative act under Sections 149, 150 and 151 of Title 31 of the United States Code.

There is no question here of the extension of a statute of limitations by a public official, as the Attorney General argued below and may argue here. We do not contend that any public official may extend a statute of limitation. We contend that under Section 24, quoted above, Congress directed that refunds be paid at any time "out of the money in the Treasury not otherwise appropriated", and provided that the moneys therefor "be deemed a permanent and indefinite appropriation"; and Section 1082 of the Customs Regulations, which has the force of law, also provided for payment of refunds out of the Excess of Deposits Account. And when the checks were deposited by the Comptroller General in the account of Outstanding Liabilities as provided in Sec. 149 of Title 31 of the United States Code, the money constituted a fund standing to "the credit of the parties in whose favor such certificates, drafts, or checks were issued, or to the persons who are entitled to receive payment therefor."

In the court below the defendant cited in support of its position *Battelle & Evans* v. *United States,* 7 Cls. 297; *Patterson* v. *United States,* 21 C. Cls. 322; *Ravesies* v. *United States,* 21 C. Cls. 243; *Carlisle* v. *United States,* 29 C. Cls. 414; *Curtis* v. *United States,* 34 Ct. Cls. 1; and *Nitro Chemical Corporation* v. *United States,* 71 C. Cls. 453; but examination of them will show at a glance that none has any pertinence here. They are all contract cases. The cases of *Battelle & Evans,* and of *Curtis,* involved contracts for sales of goods; *Patterson* and *Ravesies* involved suits to recover fees; *Carlisle's* case was for work done, and the *Nitro Chemical Corporation* case was a suit upon an award by the Secretary of War for services rendered.

Nor is *Pacific Co.* v. *United States,* 80 C. Cls. 391, cited below of any pertinence. That was an action for the recovery of the proceeds of an alleged seizure of plaintiff's property by the Government, paid into court.

Kennedy v. *United States*, 79 Fed. 893, cited below by the defendant as an "unusually strong case" that the statute of limitation was a bar, is no authority. The action was to recover drawback on the exportation of imported goods. Drawback was refused. The question before the court was from what date the statute of limitation began to run. The court held that the date was of exportation, and not the date of the decision of the Treasury Department refusing the claim. In this case we are dealing with refunds of customs duties illegally assessed, directed to be refunded by congressional appropriation, and which had been placed in the account of outstanding liabilities for the benefit of the importer.

II.

The Action Is Not to Recover Duties as Such, But Moneys Covered into the Treasury and Held for Intestate's Benefit.

Congress has plenary power to prescribe specific methods by which importers' rights against the Government may be enforced.

> "The refunding of duties by reason of a protest sustained by the board of general appraisers is a function of the secretary of the treasury, and not of the collector; and the latter may not be restrained by a suit from disposing of such moneys. • • • *A refund to which an importer is entitled may not be arbitrarily or capriciously refused by the secretary of the treasury*" (17 C. J. 639, sec. 203).
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> "The former system, or recovering duties paid, prevailed until the Customs Administrative Act of 1890 was passed, radically changing the method of obtaining customs refunds. Appeal to the secretary of the treasury, a former prerequisite to the court action, was done away with, and the action itself was superseded by proceedings before the board of general appraisers. *It is held that the remedy thus provided*

the importer is exclusive, and that no proceedings may be maintained for the recovery of duties paid • • •"
(17 C. J. 644, sec. 228).

See *Riccomini* v. *United States*, 69 F. (2d) 480-483.

That this is so is best illustrated by the fact that although millions of entries of imported merchandise have been made, not a single suit has been brought against any collector or customs officer for the recovery of refunds since the adoption of the Customs Administrative Act of 1890. Accordingly, it serves no useful purpose to discuss the question when the statute of limitation begins to run in an action to recover duties. This action is to recover the money deposited in the account of outstanding liabilities which was demanded and refused.

III.

The Statute of Limitations Did Not Begin to Run Until the Comptroller General Refused to Pay the Account in Outstanding Liabilities.

In the court below the Attorney General cited Sections 14 and 15 of the Customs Administrative Act of June 10, 1890, as fixing the date when a cause of action for refunds accrued. A mere reading of these sections will show that their only purpose was to fix a limit of time within which the importer was allowed to protest the rate and amount of duties assessed, and have the same reviewed by the Board of General Appraisers and the Circuit Court. They made no provision limiting actions to recover refunds.

A statute of limitation must be clear and explicit and may not be left to implication. Citation of law on this well settled principle is unnecessary.

The decision of the court below that the six year statute of limitation for the recovery of refunds began to run at the expiration of 30 days from the determination of the

Board of General Appraisers is not supported by anything contained in the statute. Sections 14 and 15 are followed by Section 24 providing that whenever it shall appear that more money has been deposited or paid than was found due, the Secretary of the Treasury shall direct the Treasurer to pay the excess in the manner stated. If the Secretary of the Treasury refuses to pay, he may be compelled by mandamus to do so administratively, as was suggested by the court below when it said "Whether the proper officials of the Government may still pay the refunds, we do not decide" (R. 14). However, in this case, the collector performed his duty. He issued the checks which were turned into outstanding liabilities. We are suing here for the amount of that account.

IV.

The Act of the Comptroller General in Setting Off the Amount of the Account in Outstanding Liabilities to the Payment of a Debt Alleged to Be Owing by the Intestate to the Defendant, Was in Violation of Chap. 149, Act of March 3, 1875, as Amended by Title II, Section 13, Chap. 212, Act of March 3, 1933.

That statute provides that when a final judgment is recovered against the United States, or other claim allowed against it, it shall be the duty of the Comptroller General to withhold payment of an amount of such judgment or claim equal to any debt due to the United States, and if the plaintiff or claimant denies liability, the Comptroller General shall withhold payment and bring action on the government's claim. Here the Comptroller General did not *withhold* payment, nor was action brought, but he *directed an offset* in partial liquidation of a claim of loss of revenue with compound interest at 6% per annum. The demurrer admits the allegations of paragraph "Eighteenth" of the petition (R. 5-6).

The court below held that the defendant "was not entitled to use or apply these refunds as such offset" (R. 10). In view of this decision the money in the account was available to the plaintiffs, and they are entitled to recover the same. Assuming even that the intestate withheld duties, the Government's claim could only carry interest, if allowed by the court. Certainly the Comptroller General could not add interest, let alone compound interest at 6%.

It is respectfully submitted that the writ should be allowed as prayed for.

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